BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

TAMERA MILNER	)	
Claimant	)	
VS.	)	
	)	Docket No. 198,875
AMERICAN DRUG STORES, INC.,	)	
d/b/a OSCO DRUG	)	
Respondent	)	
	)	
AND	)	
	)	
KEMPER INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent appeals from an Award rendered by Administrative Law Judge Julie A. N. Sample on November 26, 1997. The Appeals Board heard oral argument June 16, 1998.

APPEARANCES

Claimant appeared by her attorney, Leah Brown Burkhead of Mission, Kansas. Respondent and its insurance carrier appeared by their attorney, Robyn M. Butler of Overland Park, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The issues to be considered on appeal are:

(1) What is the nature and extent of claimant's disability? The ALJ awarded a 66.5 percent work disability. Respondent contends

claimant had two scheduled injuries and is not entitled to work disability.

(2) What is the date of claimant's accident?

(3) Is claimant entitled to be reimbursed for the medical treatment by Dr. Lynn D. Ketchum?

(4) Is claimant entitled to temporary total disability benefits for the period October 13, 1995, through December 18, 1995, while off work following the surgery by Dr. Ketchum?

(5) Is respondent responsible for the costs of Dr. Ketchum's services when some of those services were paid by Medicaid?

(6) Is claimant entitled to temporary total disability benefits for the period August 10, 1994, through August 14, 1994, and March 29, 1995, through April 5, 1995?

(7) Is claimant entitled to reimbursement for travel expenses while attending the court-appointed medical examination by Dr. Lanny W. Harris and, if so, how much?

` (8) Does the employer's contribution to claimant's Union constitute "additional compensation" within the meaning of K.S.A. 44-511?

(9) What is the amount of compensation due, if any?

(10) Is claimant entitled to future medical expenses?

This list of issues is the list specified by respondent but has been rearranged to coincide with the order in which the issues are addressed in the conclusions of law below.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board concludes:

Findings of Fact

(1) Claimant worked in the camera department for respondent Osco Drug Store. Her duties included ringing items using a scanner and cash register keyboard, logging film into the computer using a computer keyboard and scanning wand, answering the phone, hanging shelf tags, stocking, cleaning her work area, and ordering stock. Claimant

generally used her right hand on the keyboard but scanned with her left. The keyboard work logging in film was generally not more than one-half hour per day. The work on the register was occasional throughout the day.

(2) Claimant began noticing problems with her right hand in July 1994. The symptoms included pain, numbness, swelling, and tingling in her fingers and up into her arm. The symptoms were worse while she worked on the cash register or computer keyboard.

(3) Claimant reported the problems to respondent and respondent referred her first to Metcalf South Health Services and was taken off work for five days beginning August 10, 1994. Claimant was then referred to Dr. William O. Reed, Jr. Dr. Reed first saw claimant September 1, 1994, for complaints of pain and swelling in her right hand and wrist. His findings on examination were normal range of motion, voluntary weak grip, negative percussion test, negative Phalen's test, and weakly positive but inconsistent Finkelstein's. He also found mild crepitus in both wrists but noted claimant was not complaining of pain in the left wrist.

(4) Based on what he considered inconsistencies in the findings, Dr. Reed ordered a Greenleaf upper extremity evaluation. That evaluation, done September 7, 1994, showed claimant was not exerting maximal effort on grip strength test. Dr. Reed considered the test to be evidence of symptom magnification. As of September 8, 1994, Dr. Reed released claimant to return to her regular duties and rated the impairment as 2 percent of the right upper extremity.

(5) Dr. Reed saw claimant again December 1, 1994. He found positive Finkelstein but the test did not produce any change in intensity with radial or ulnar deviation of the wrist, which, according to Dr. Reed, it should. Dr. Reed suspected claimant might have de Quervain's disease and ordered steroid injections. The injections did not help significantly and Dr. Reed considered claimant's response to be atypical. Dr. Reed then re-released claimant. He diagnosed symptom magnification and possible tendonitis of the wrist.

(6) After the release by Dr. Reed, claimant continued working full-time and the symptoms in her right upper extremity worsened. On April 18, 1995, claimant began working part-time, approximately 40 to almost 70 hours per month. The change to part-time was at claimant's request and, according to claimant, was due to pain she was experiencing from doing the work.

(7) In late March 1995, before she went to part-time work, claimant began having symptoms in her left upper extremity. The problems were the same type of problems she was having in the right upper extremity. Claimant went to Shawnee Mission Medical Center on March 29, 1995, and was taken off work until she could see Dr. Reed.

(8) Dr. Reed saw claimant on April 5, 1995, and again on April 11, 1995, for the symptoms in the left hand and wrist. Dr. Reed prescribed anti-inflammatory medication but

again diagnosed tendonitis without objective findings and symptom magnification. Dr. Reed testified he would have rated the impairment as 2 percent of the left upper extremity. He did not recommend restrictions. He reviewed a list of the tasks claimant had prepared regarding prior employment and stated that on the basis of her objective exam, he found none of the tasks to be contraindicated. When he last saw claimant, he did, however, suggest she modify her life duties and job responsibilities. Dr. Reed also stated, in a letter to Kemper Insurance, that he could not contradict claimant's statement that the symptoms she experienced were related to other work activities.

(9) In May 1995, a preliminary hearing was held and the ALJ ordered respondent to provide a change of physician as Dr. Reed had indicated he had nothing further to offer, but claimant was still having symptoms. Dr. John B. Moore, IV, was selected. Dr. Moore concluded claimant was suffering from pain in her hands of unknown etiology. Dr. Moore did not believe claimant had tendinitis. He recommended that claimant change her job. He found nothing anatomically wrong which could be corrected by surgery or any other treatment.

(10) In April of 1995 claimant also went on her own to see Dr. Lynn D. Ketchum. Dr. Ketchum diagnosed right flexor tenosynovitis and recommended surgery. Claimant's counsel requested authorization for claimant to be treated but no authorization was ever given. Dr. Ketchum performed surgery on the right wrist in October 1995. Claimant testified the surgery provided some relief. The tingling and numbness do not keep her awake at night but she still has pain. Claimant was off work from October 13, 1995, until December 18, 1995. According to claimant, Dr. Ketchum recommended permanent restrictions of no repetitive work and no heavy lifting.

(11) Respondent did not authorize treatment by Dr. Ketchum and the ALJ did not order treatment by Dr. Ketchum.

(12) Claimant testified, and the Board finds, the condition in claimant's right upper extremity gradually worsened from the time she reported the first symptoms in July 1994 until she underwent surgery in October 1995.

(13) The injury to claimant's left upper extremity developed, in significant part, along with and at the same time claimant's injury to the right upper extremity was worsening.

(14) On December 18, 1995, after surgery by Dr. Ketchum, claimant returned to work on a part-time basis. She initially worked only a few hours but in May, June, and July worked 109.83, 139.17, and 113.81 hours. Respondent modified her job duties but on July 26, 1996, claimant voluntarily terminated her employment.

(15) Timothy L. Porter, general manager, testified he recalled seeing a note from Dr. Ketchum saying claimant could do cash register work two hours/day. Mr. Porter also testified claimant's restrictions could be accommodated on a full-time basis. She could

work as a floor clerk and not use a cash register. He denied claimant's assertion that they had no work for her.

(16) After leaving her employment with respondent, claimant moved to Arkansas where she has family. She applied for employment with several employers but was not able to find employment she thought she could do. She, therefore, enrolled in an educational program assisted by the Arkansas vocational rehabilitation program.

(17) The parties were not able to agree on the extent of claimant's functional impairment and the ALJ referred claimant for an evaluation by Dr. Lanny W. Harris. Dr. Harris saw claimant March 11, 1997. He found bilateral impairment with 10 percent to the right upper extremity and 8 percent at the wrist level of her left upper extremity. These two upper extremity ratings convert to 6 percent and 5 percent general body and then combine to a rating of 11 percent impairment to the whole body using the AMA Guides to the Evaluation of Permanent Impairment, Third Edition (Revised). He recommended as restrictions: claimant should not engage in hard, repetitive grasping or gripping with her upper extremities, prolonged keyboard operations, or prolonged writing. In connection with this court-ordered IME, claimant, who then lived in Arkansas, incurred $92.56 in meal expenses, $104.33 for two nights of hotel expense, and $309 for 1,030 miles at 30 cents per mile.

(18) At the request of claimant's counsel, claimant was examined and her injury evaluated by Dr. James P. Hopkins. Dr. Hopkins rated the impairment as 25 percent to the right upper extremity and 15 percent to the left upper extremity. He combined these ratings to arrive at a whole body impairment of 23 percent. Dr. Hopkins testified he would recommend restrictions similar to those of Dr. Harris. Dr. Hopkins also testified that, in his opinion, claimant has lost the ability to perform 53 percent of the tasks she performed in her work during the 15 years prior to this injury. On cross examination, he acknowledged that this would be approximately 14 percent loss if the tasks listed were not done on a repetitive basis.

(19) Respondent paid $32.91 per week to the union on claimant's behalf to purchase health insurance for claimant.

Conclusions of Law

(1) K.S.A. 44-510d provides a list, referred to as a schedule, of the maximum number of weeks of benefits for injury to various parts of the body. If the injury results in a partial loss of use, the percentage of loss is multiplied by that maximum number of weeks. For injury to the upper extremity, not including the shoulder, the maximum is 210 weeks. For injuries not included in this list, unscheduled injuries, calculation of benefits is based on a maximum of 415 weeks. Simultaneous injury to two of the same scheduled members is

considered an unscheduled injury and benefits are based on 415 weeks. Depew v. NCR Engineering & Manufacturing., 263 Kan. 15, 947 P.2d 1 (1997).

(2) The Board finds claimant did simultaneously injure both her right and left upper extremities and is entitled to benefits for an unscheduled or general body disability.

(3) For a general body disability, a claimant is entitled to either the functional impairment or, if claimant does not earn a wage after the injury equal to 90 percent or more of the pre-injury wage, claimant may be entitled to a higher work disability. K.S.A. 44-510e.

(4) K.S.A. 44-510e(a) defines work disability as the average of the wage loss and task loss:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.

(5) The wage loss factor in the work disability calculation is subject to additional qualification. If the claimant is offered employment which he or she could perform but refuses to even attempt that work, the wage in the offered job is imputed to the claimant for purposes of the calculation. Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995). In addition, even if the claimant is not offered employment, a wage loss of 100 percent may be used in the calculation only if claimant shows that she has made a good faith effort but has, nevertheless, not been able to find employment. If claimant does not establish that she has made a good faith effort to find employment, a wage is to be imputed to claimant based on the relevant evidence showing what wage claimant would be able to earn. Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

(6) The Board finds claimant could have continued in her employment for respondent and, in fact, could have worked full time at a wage which would be 90 percent or more of her pre-injury wage. This conclusion is based on several factors. First, the Board finds appropriate the restrictions recommended by the independent medical examiner. It appears the work claimant did for respondent, even before any possible accommodation, would not have violated those restrictions. The Board also finds reason in the record to believe claimant may have overstated the severity of her symptoms. Finally, the Board finds convincing respondent's evidence that it could and would have accommodated claimant's restrictions, to the extent necessary. The Board does so, in part, because respondent had, up to the point claimant quit, accommodated not only the restrictions but claimant's request for limited work time. In summary, the Board finds claimant voluntarily

quit a job she could perform and which would have paid at least 90 percent of her pre-injury wage.

(7) Applying the rationale from Foulk and Copeland, the Board finds claimant's disability must be limited to the functional impairment.

(8) The Board adopts the functional impairment rating by Dr. Harris, the independent medical examiner, of 11 percent to the body as a whole.

(9) For a repetitive trauma injury, one occurring over a period of time, the date of accident is the last day worked if the injury is the reason the claimant leaves work. Berry v. Boeing Military Airplanes, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994). If claimant does not leave work because of the injury, the last date worked may not be the date of accident. Condon v. Boeing Co., 21 Kan. App. 2d 580, 903 P.2d 775 (1995). The date of accident may, for example, be the date restrictions are implemented and no further injury occurs. Alberty v. Excel Corp., 24 Kan. App. 2d 678, 951 P.2d 967, *rev. denied* 264 Kan.___ (1998). The Board does not, in this case, believe the injury was the reason claimant left work. The Board has, therefore, adopted October 13, 1995, the date claimant left work before surgery by Dr. Ketchum, as the date of accident. It appears claimant was accommodated after that date and it does not appear there was any permanent injury after that date.

(10) Pursuant to K.S.A. 44-510, the employer is obligated under the Workers Compensation Act to provide medical care reasonably necessary to relieve and cure the employee from the effects of the injury. Subsection (c)(1) of that same statute provides a procedure to be followed when the medical care authorized by the employer is not satisfactory. Subsection (c) (2) limits the employer's liability for unauthorized medical care to $500. Case law provides an exception to the statutory provision when the employer neglects to provide medical care. If the employer has neglected to provide care, that employer may be liable for the costs of the care the employee obtains on his or her own. Cross v. Wichita Compressed Steel Co., 187 Kan. 344, 356 P.2d 804 (1960). In this case, the ALJ found the services provided by Dr. Ketchum were reasonably necessary to relieve and cure claimant's injury and ordered respondent to pay for that care. The Board finds the care by Dr. Ketchum was unauthorized and further finds respondent had not neglected to provide care. Respondent provided first the services of Dr. Reed. After he released claimant, claimant sought and obtained a preliminary hearing order which required respondent to name three other physicians. Under that procedure, claimant saw Dr. Moore. Still not satisfied, claimant went on her own to Dr. Ketchum. The Board finds the care and treatment by Dr. Ketchum was unauthorized. The record indicates respondent has payed the maximum unauthorized medical expense and the Board holds respondent is not obligated to pay for the treatment provided by Dr. Ketchum.

(11) Respondent has argued that if it is liable for the costs of Dr. Ketchum's treatment, the amount respondent owes Dr. Ketchum is limited by Medicaid regulation to the amount

Medicaid paid for the care. The decision that Dr. Ketchum's treatment must be considered as unauthorized medical renders this issue moot.

(12) Claimant is entitled to temporary total disability benefits while off for Dr. Ketchum's surgery. Although the Board has found the surgery by Dr. Ketchum to be unauthorized, the Board, nevertheless, concludes the surgery by Dr. Ketchum was not inappropriate under the circumstances and finds that claimant was, in fact, temporarily totally disabled for the period October 13, 1995, through December 18, 1995, after the surgery by Dr. Ketchum. Claimant will, therefore, be awarded temporary total disability benefits during that period.

(13) The Board finds claimant was temporarily and totally disabled during the period August 10, 1994, through August 14, 1994, and March 29, 1995, through April 5, 1995.

(14) The Board agrees with and adopts the findings and conclusions by the ALJ relating to the expenses claimant incurred for travel, meals, and lodging while attending the court-appointed medical examination by Dr. Harris. Claimant is, therefore, awarded her mileage and one-half of her meals and lodging.

(15) The Board agrees with and adopts the findings and conclusions by the ALJ relating the money respondent paid the Union for the purchase of health insurance. That $32.91 should be considered "additional compensation" and be added to the base wage of $211.15 after July 26, 1996, when respondent ceased payment of that benefit. K.S.A. 44-511.

(16) Respondent has listed as a separate issue, the amount of compensation due, if any. This is not, however, a separate issue apart from the other issues considered and will not, therefore, be separately addressed.

(17) The Board finds claimant should be awarded future medical expenses upon proper application to and approval by the Director.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Julie A. N. Sample, dated November 26, 1997, should be, and is hereby, modified.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Tamera Milner, and against the respondent, American Drug Stores, Inc., d/b/a Osco Drug, and its insurance carrier, Kemper Insurance Company, for an accidental injury which occurred

October 13, 1995, and based upon an average weekly wage of $211.15 for 11.14 weeks of temporary total disability compensation at the rate of $140.77 per week or $1,568.18, followed by 29.86 weeks at the rate of $140.77, or 4,203.39, based on an average weekly wage of $211.15. The remaining 15.79 weeks would be at the rate of $162.71, based on the average weekly wage of $244.06, equalling $2,569.19. The total permanent partial disability benefits will, therefore, be $6,772.58 for an 11% permanent partial general disability, making a total award of $8,340.76, all of which is presently due and owing, less amounts previously paid.

The Appeals Board approves and adopts all other orders in the Award that are not inconsistent herewith.

IT IS SO ORDERED.

Dated this ____ day of July 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Leah Brown Burkhead, Mission, KS
Robyn M. Butler, Overland Park, KS
Julie A. N. Sample, Administrative Law Judge
Philip S. Harness, Director